JUL 18 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103
Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Argument 8

Conclusion 17

Table of Authorities

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 39 L.Ed.2d 147 (1974) 8, 8n, 11, 12n, 13n

American Pipe and Construction Co. v. Utah, 414 U.S 538 (1974) 12, 13, 14

Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) 14, 15n

Brady v. Bristol Myers, Inc., 459 F.2d 621 (8th Cir. 1972) 8n

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972) 8n

Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 12, 13, 15

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972) 8n

Culpepper v. Reynolds Metals, 421 F.2d 888 (5th Cir., (1970) 16, 16n

PAGE

EEOC v. E.I. Dupont de Nemours & Co., 373 F.Supp. 1321 (D. Del. 1974) 9n

Guerra v. Manchester Terminal Corp., 350 F.Supp. 529 (S.D. Tex. 1972) 15n

Henderson v. First National Bank of Montgomery, 344 F.Supp. 1373 (M.D. Ala., 1972) 15

Long v. Ford Motor Co., 7 CCH EPD ¶9290 (6th Cir. 1974) 8n

LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798 (7th Cir. 1973) 10n

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 7, 8n, 9n, 14

Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972) 16n

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 15n

Reynolds v. Daily Press Inc., 5 CCH EPD ¶7991 (E.D. Va. 1972) 14, 15

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) 8n

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 10n

Schiff v. Mead Corp., 3 CCH EPD ¶8043 (6th Cir. 1970) 16

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 13n, 15

PAGE

Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) 8n, 9n, 15

Wells v. Gainesville-Hall County Economic Opportunity Organization, Inc., 5 CCH EPD ¶8541 (N.D. Ga. 1973) 16n

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 8n

Statutes:

Civil Rights Act of 1866, 42 U.S.C. §1981 ..... *passim*

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*

Federal Employer's Liability Act, 42 U.S.C. §§51 *et seq.* 13

Federal Rules of Civil Procedure, Rule 60(b) 7

Tennessee Code Ann. §28-304 ..... 6n, 7, 9n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR PETITIONER

Opinions Below

1. District Court's order in No. C-71-66 dismissing claims under 42 U.S.C. §1981 and granting summary judgment to union locals and partial summary judgment to REA Express[1] on Title VII claims, June 14, 1971, reported at 7 CCH EPD ¶9108 (91a-93a).[2]

2. District Court's order in No. C-71-66 dismissing action without prejudice, February 16, 1972, reported at 7 CCH EPD ¶9109 (47a-48a).

3. District Court's opinion and order in No. C-72-183 dismissing refiled complaint, January 25, 1973, reported at 7 CCH EPD ¶9110 (98a-104a).

---

[1] Effective June 1, 1970, respondent company's corporate name was changed from Railway Express Agency, Inc. to REA Express, Inc. (52a).

[2] This form of citation is to pages of the Appendix.

4. Opinion of Court of Appeals, November 27, 1973, reported at 489 F.2d 525 (105a-113a).

5. Order Denying Rehearing, January 15, 1974, reported at 489 F.2d 525, 530 (114a-118a).

Jurisdiction

The Court of Appeals entered judgment on November 27, 1973. A timely request for rehearing was denied January 15, 1974. The petition for certiorari was filed April 15, 1974, and was granted on June 3, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?

Statement of the Case

Petitioner Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment.

Petitioner was hired by respondent REA Express, Inc. ("REA") in the spring of 1964 as an express handler in Memphis, Tennessee.

On May 31, 1967, petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") charging respondent REA with discriminating against its black employees with respect to seniority rules and job assignments. He also charged respondent union locals with

maintaining racially segregated locals, Brotherhood of Railway Clerks Tri-State Local for whites and Lily of the Valley Local for blacks. On June 20, 1967, respondent REA terminated petitioner's employment, and on September 6, 1967, petitioner amended his EEOC charge to allege that he had been discharged because of his race (14a-16a).

The EEOC issued an investigation report on December 22, 1967, concluding that REA directed black employees to membership in Lily of the Valley Local and white employees to membership in Tri-State Local, that membership dues were higher in the black local than in the white local, that REA maintained racially segregated job classifications, that respondent REA's seniority and job assignments were discriminatory, that REA discriminated against blacks in the imposition of disciplinary action, and that petitioner was discriminatorily discharged (32a-40a). On March 31, 1970, the EEOC issued a decision finding reasonable cause to believe that respondent had violated Title VII of the Civil Rights Act of 1964, and on or about January 15, 1971, petitioner received from EEOC a notice of his right to bring suit within 30 days (8a).

Petitioner was unable to obtain private counsel and District Judge Bailey Brown entered an order February 12, 1971, appointing an attorney to represent petitioner and allowing petitioner's notice of right to sue to be filed as a complaint on a pauper's oath (Civil Action No. C-71-66) (8a).

The court-appointed attorney filed a "Supplemental Complaint" alleging violation of Title VII and 42 U.S.C. §§1981 *et seq.*, and invoking the Court's jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5f. The complaint, filed March 18, 1971, alleged that respondent REA, in conjunction with respondent union locals, engaged in a policy and practice of discriminating against black employees with

respect to promotional opportunities and that respondent's job assignment and promotion practices served "to maintain a preexisting pattern of racial discrimination in employment". Petitioner further alleged that he had been denied supervisory training and promotion opportunities which were accorded to white employees, that respondent union locals did not afford black members (including petitioner) the same quality of representation afforded to white members, and that petitioner's discharge was the result of respondent REA's racially discriminatory employment practices. Petitioner prayed for preliminary and permanent injunctive relief, back pay, costs and attorney's fees (60a-66a).

Respondents REA and union locals filed their answers on March 29 and April 6, 1971, respectively. The case was then scheduled for trial on August 18, 1971 (8a). On April 30 and June 3, 1971, the unions and REA, respectively, filed motions to dismiss or in the alternative for summary judgment (8a). Petitioner's court-appointed attorney filed no memoranda or affidavits on behalf of petitioner in opposition to these motions (8a-9a).

Judge Brown entered an order June 30, 1971 which, *inter alia*, 1) dismissed all claims based on 42 U.S.C. §1981 as barred by Tennessee's one-year statute of limitations for actions "for compensatory or punitive damages, or both, brought under the federal civil rights statutes"; 2) granted summary judgment to the defendant unions on the grounds that "from the undisputed facts" plaintiffs had no grounds for relief under Title VII; and 3) granted REA partial summary judgment on the issue of improper supervisory training (91a-93a). The case having been rescheduled for trial on February 2, 1972, respondent REA served petitioner with interrogatories, filed a pre-trial memorandum as required by local rules of court, and took petitioner's deposition. Petitioner's court-appointed counsel took no

discovery, by interrogatories, deposition, or otherwise, and filed no pretrial memorandum (9a).

REA offered Johnson a settlement of one hundred and fifty dollars which Johnson refused. Petitioner's counsel then filed, on January 5, 1972, a motion to be relieved as attorney of record on the grounds that petitioner's case was "questionable", petitioner had not substantiated money damages and had not expressed an intention of advancing the funds necessary for taking depositions, and because petitioner had refused REA's settlement offer. The clerk of the district court advised petitioner by letter dated January 14, 1972 that the motion to withdraw had been granted, and informed plaintiff that if he did "not obtain another counsel to represent [him] within 30 days from this date, [his] claim will be dismissed without prejudice" (9a-10a).[3]

Upon receipt of the clerk's letter, petitioner, in an effort to obtain representation, contacted the Memphis EEOC field attorney, the Memphis & Shelby County Legal Services Association, the Shelby County Bar Association Legal Referral Service, and two private attorneys. Finally, toward the end of the 30 days he went to the firm of Ratner, Sugarmon & Lucas and explained his plight to William E. Caldwell of the firm (10a). On February 17, 1972 Caldwell wrote a letter to Judge Brown indicating that he was attempting to obtain financial support for the litigation and requesting an additional thirty days for the petitioner to obtain counsel (45a-46a). However, the preceding day, February 16, Judge Brown had entered an order dismissing petitioner's case "without prejudice" (47a-48a).

---

[3] Petitioner received no notice of a hearing on the motion to withdraw and was afforded no opportunity to state his position. The court made no finding that petitioner was either unable or unwilling to proceed *pro se* or that petitioner was responsible for any delay in bringing the case to trial. No order granting the motion to withdraw was ever entered.

On May 5, 1972, Caldwell again wrote to Judge Brown indicating that the NAACP Legal Defense and Educational Fund had agreed to pay litigation costs for petitioner, entering an appearance for petitioner, and requesting that the order of February 16 be vacated and that the case be reinstated on the active docket of the court (49a-50a). Judge Brown replied on May 8, 1972 indicating that the "proper way to handle this matter would be to file a new action since the old one has long been dismissed" (51a).

Pursuant to Judge Brown's letter, Caldwell, on May 31, 1972, filed a new complaint on petitioner's behalf (Civil Action No. C-72-183), assigned to District Judge Harry W. Wellford. The new complaint reiterated petitioner's original allegations (4a-13a). Respondents REA and union locals moved for dismissal or for summary judgment on the grounds of untimeliness and *res judicata* (58a-59a, 94a-99a). The district court, *per* Judge Wellford, entered an order of dismissal on the grounds that 1) petitioner's claims under 42 U.S.C. §§1981 *et seq.* were barred by Tennessee's one-year statute of limitations on "actions for compensatory, or punitive damages, or both, brought under the federal civil rights statutes";[4] 2) petitioner had "failed to meet the statutory requirements" of Title VII because he failed to refile his suit within 30 days after Judge Brown's February 16, 1972 order of dismissal without prejudice, 3) Judge Brown's interlocutory order of June 14, 1971 granting summary judgment to respondent union locals and partial summary judgment to respondent REA was a "final disposition" constituting *res judicata,* and 4) petitioner's claims under 42 U.S.C. §§1981 *et seq.* were barred because he had not pursued his administrative remedies under the Railway Labor Act (98a-104a).

[4] Tenn. Code Ann. §28-304.

The Court of Appeals, in an opinion by Judge Weick, affirmed the order of dismissal, disposing of the case on timeliness grounds. First, the court held that petitioner's claims under 42 U.S.C. §1981 were time-barred by the running of the statute of limitations. In reaching this conclusion as to the Section 1981 claims the Court of Appeals held: a) that the applicable statute was the one-year limitation contained in Tenn. Code Ann. §28-304; and b) that the running of the statute on the Section 1981 claims was not tolled by petitioner's timely filing of charges with EEOC. Second, the court held that the Title VII claims were jurisdictionally barred because "at a minimum [petitioner] had to file the new case within thirty days from the date of dismissal without prejudice"[5] (105a-113a). The Court of Appeals did not discuss the issues of *res judicata* and exhaustion of remedies under the Railway Labor Act or an additional question assigned for error, the failure of the District Court to grant petitioner relief from the dismissal without prejudice pursuant to Rule 60(b), F.R. Civ. P.

In its opinion denying rehearing, the Court of Appeals reaffirmed its initial opinion, stating that Tennessee's attempted application of a one-year limitation period to all civil rights actions, regardless of their nature, is not "arbitrary in a constitutional sense" and the statute does not create "an explicit racial classification . . . because citizens of all races are entitled to take advantage of the federal civil rights statutes" (114a-118a). It explicitly rejected the holding of *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-995 n.30 (D.C. Cir. 1973)

[5] With regard to Judge Brown's February 16, 1972 order of dismissal without prejudice, the Court of Appeals stated:

"We need not determine the propriety of this order because it was a final order from which no appeal was taken" (107a).

that the filing of petitioner's EEOC charge tolled the running of the state statute of limitations on his Section 1981 claim (114a-118a).[6]

This Court granted Certiorari to consider the tolling question. If petitioner prevails, the issue of the timeliness of refiling his Title VII action will be moot since he will be able to proceed under Section 1981. We submit that the *res judicata* issue should be remanded to the Court of Appeals for reconsideration and clarification,[7] and the exhaustion issue should be remanded to the Court of Appeals for decision.

Argument

As this Court has pointed out in *Alexander* v. *Gardner-Denver*, —— U.S. ——, 39 L.Ed. 2d 147, 158 (1974), Congress has deliberately created a variety of remedies against racial discrimination in employment. It is well established that an aggrieved employee can bring suit under 42 U.S.C. §1981 (Civil Rights Act of 1866), and that this statute creates a right of action independent of that embodied in 42 U.S.C. §§2000e, *et seq.* (Title VII of the Civil Rights Act of 1964).[8]

---

[6] In a footnote, the Court stated that it agreed with the district court on the *res judicata* question (114a).

[7] The order of summary judgment was interlocutory and was limited to petitioner's Title VII claims (92a).

[8] *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Long* v. *Ford Motor Co.*, 7 CCH EPD ¶9290 (6th Cir. 1974); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); *Brady* v. *Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc.*, 476 F.2d 979 (D.C. Cir. 1973). See also *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed. 2d 147, 158 & n. 7, 9.

Petitioner initiated proceedings under Title VII by filing a charge with the EEOC on May 31, 1967, while still employed by REA. His employment was terminated on June 20, 1967. If the one-year statute of limitations which the courts below applied to petitioner's Section 1981 claim were not deemed tolled by the filing of his EEOC charge, petitioner would have to have filed suit under this section no later than June 20, 1968.[9] The EEOC did not issue its finding of reasonable cause until March 31, 1970, twenty-one months later. The EEOC did not issue a right-to-sue letter until January 10, 1971, two and one-half years later.[10] It is likely that had petitioner brought suit under Section 1981 within one year following termination of his employment, the suit would have reached final disposition long before the EEOC completed its processing of petitioner's charge. And as the course of petitioner's journey through the courts illustrates only too well, the road to relief under Title VII contains too many procedural pot-holes for the

[9] Congress did not enact a statute of limitations applicable to 42 U.S.C. §1981. Pursuant to 42 U.S.C. §1988, the applicable statute of limitations is that which governs the most analogous state action. *Waters* v. *Wisconsin Steel Works, supra,* 427 F.2d at 488; *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F.2d at 994.

The Court below held that the most analogous state statute of limitations is Tenn. Code 28-304, which provides a one-year limitation on the commencement of, *inter alia,* "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes". In his Petition for a Writ of Certiorari, petitioner contended that this statute was inapplicable by its terms to the case at bar, and that if it were applicable, it would be violative of both the supremacy clause of Article VI of the Constitution and the equal protection clause of the Fourteenth Amendment. The Court did not grant certiorari on these questions.

[10] The delay in the processing of petitioner's charge was not aberrational. See *EEOC* v. *E.I. Du Pont de Nemours & Co.,* 373 F.Supp. 1321, 1329 & n. 6-11 (D. Del. 1974).

employee willingly to forego his cause of action under Section 1981.[11]

Title VII, on the other hand, is in some instances the better remedy under which to litigate employment discrimination claims, particularly for aggrieved individuals who can ill afford to pursue their remedy under Section 1981. In enacting Title VII, Congress created for the benefit of a complainant the EEOC, whose purpose is to investigate and conciliate claims on the complainant's behalf.[12] It also created an effective judicial enforcement scheme for the vindication of complainant's rights. Under Title VII, as amended in 1972, the Commission has the authority to sue on behalf of the complainant,[13] and to compensate all witnesses who appear on behalf of the Commission during its investigatory proceeding or in court.[14] Furthermore, the Act authorizes EEOC to seek "pattern and practice" relief including remedies for complainants.[15] Moreover, an aggrieved party may, as petitioner did in the instant case, upon application have the court appoint an attorney to assert his claims without the payment of fees, costs, or security.[16]

From the point of view of an individual with limited resources, unable to obtain counsel, it is more desirable to file a charge under Title VII and thus have made available

[11] See, e.g., *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (scope of judicial complaint is limited to scope of EEOC investigation which can reasonably be expected to grow out of charge of discrimination); *LeBeau* v. *Libby-Owens-Ford Co.*, 484 F.2d 798 (7th Cir. 1973) (international union dismissed from Title VII action where EEOC charge named only local).

[12] 42 U.S.C. §2000e-4(a).

[13] 42 U.S.C. §2000e-5(f)(1).

[14] 42 U.S.C. §2000e-4(g)(2).

[15] 42 U.S.C. §2000e-6 and 6(e).

[16] 42 U.S.C. §2000e-5(f)(1).

to him the full resources of the EEOC than to commence litigation under Section 1981. As long as he has reason to hope that he can get the relief he seeks by resort to the EEOC, he should not have to go to the expense of filing suit.

The position taken by the Sixth Circuit Court of Appeals is incompatible with the flexible approach to overlapping remedies in employment discrimination cases—viz., that pursuit of one does not preclude another—taken by this Court in *Alexander* v. *Gardner-Denver Co., supra,* and, if allowed to stand, would both interfere substantially with the successful administration of Title VII and be adverse to the interests of judicial economy.

In *Alexander,* this Court held that submission of a claim of racial discrimination in employment to arbitration under the non-discrimination clause of a collective bargaining agreement did not bar the employee from suing his employer under Title VII. This Court rejected the doctrine of election of remedies, stating that "the legislative history of Title VII manifested a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." 39 L.Ed. 2d at 158-59. The Court went on to reject the argument that federal courts should defer to arbitral decisions on discrimination claims under certain circumstances, observing:

> "A deferral rule might also adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less."

39 L.Ed. 2d at 164.

The relationship, in *Alexander*, between arbitration and litigation under Title VII, is analogous to the relationship in the instant case between the EEOC fact-finding and conciliation processes and litigation under 42 U.S.C. §1981. The reasoning that led the Court to accommodate both avenues of redress in *Alexander* applies with equal, if not greater, force to the case at bar. It is obvious that the necessity of complying with a short statute of limitations even though a charge was pending before the EEOC would discourage and/or render futile recourse to the Congressionally favored policy of conciliation,[17] "[t]he possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less." *Alexander* v. *Gardner-Denver Co., supra,* 39 L.Ed.2d at 164. *Cf., American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 555-56 (1974).

This Court has stated that statutes of limitation are "primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* [321 U.S. 342, 348-49 (1944)]." *Burnett* v. *New York Central R. Co.,* 380 U.S. 424, 428 (1965). Clearly, the policies underlying the statute of limitations applicable to petitioner's Section 1981 claims were served by the filing of his EEOC charge.

Where the policies of ensuring essential fairness to defendants and of barring a plaintiff "who has slept on his

[17] *Alexander* v. *Gardner-Denver Co., supra,* 39 L.Ed.2d at 156.

rights" are satisfied, statutory periods of limitation should be tolled where to do so would lead to the vindication of petitioner's rights, thereby promoting Congressional policy embodied in "humane and remedial" legislation, and would further the interests of judicial economy. *Burnett* v. *New York Central R. Co., supra,* 380 U.S. at 428, 434; *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 555-56.[18]

In *Burnett* v. *New York Central R. Co., supra,* petitioner had timely filed an action in state court under the Federal Employer's Liability Act, 45 U.S.C. §§51 *et seq.* After the action was dismissed for improper venue, petitioner brought an identical action in federal district court. The District Court dismissed the complaint on the ground that it was barred by the limitation provision embodied in the FELA, and the Court of Appeals affirmed. This Court reversed, holding that the limitations statute was tolled during the pendency of the state action. The Court observed that to hold otherwise would discourage FELA actions in the courts of certain states, in contravention of the intent of Congress, in providing for concurrent state and federal court jurisdiction, to protect the plaintiff's right to bring an FELA action in state court. *Id.* at 434. Similarly, not to permit tolling in the instant case would discourage the bringing of actions under Title VII as well as Section 1981 where Congress has evidenced an intent to protect an employee's right to do both.[19]

---

[18] While the applicable statute of limitations is a state statute, the rules with respect to which statute should be applied and the circumstances under which that statute should be tolled are federal rules. The rules adopted should be those which best serve the policies expressed in the federal statutory scheme. *Macklin* v. *Spector Freight Systems, Inc., supra,* 476 F.2d at 994-95 n. 30. Cf. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239-40 (1969).

[19] See *Alexander* v. *Gardner-Denver Co., supra,* 39 L.Ed.2d at 158 & n. 7, 9.

In *American Pipe and Construction Co.* v. *Utah*, *supra*, this Court held that commencement of a class action tolled the running of the limitation period on actions by members of the purported class until the entry of the order that the suit could not proceed as a class action. A contrary holding would have induced potential class members to file protective motions to intervene or to join in the event that a class was later found unsuitable, breeding needless duplication of motions and depriving class actions of "the efficiency and economy of litigation which is a principal purpose of the procedure". *Id.*, 414 U.S. at 553. In the case at bar, failure to adopt a tolling rule will require employees, who wish to proceed under both Title VII and Section 1981, to file two separate actions, resulting in economic hardship to the plaintiffs and a further strain on judicial resources.

In *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) the court, adopting the rule that the filing of an EEOC charge tolls the running of the period of limitation on a Section 1981 claim, reasoned as follows:

> "First, we believe Title VII indicates a recent congressional decision to favor informal methods of settlement and conciliation short of litigation in employment discrimination cases. Plaintiffs, who often proceed initially without assistance of counsel and bring their complaints first to EEOC in accord with this legislative policy, should not be penalized for this action when they later sue for relief in District Court under both Title VII and §1981, which overlaps Title VII. . . . Moreover, we believe the broad purpose of statutes of limitations—prevention of stale claims and unfair surprise—are not frustrated by adopting the rule of *Boudreaux* [v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir., 1971)] and *Reynolds* [v. *Daily Press, Inc.*, 5 CCH EPD ¶7991 (E.D. Va. 1972)]. The local and Spector were assuredly put on notice while the case

was under investigation by the EEOC, for the investigator's report indicate that Spector's records were examined and officials of the local interviewed. . . . [W]e are not dealing with a clear expression of congressional intent as to limitations of §1981 actions, for Congress enacted no statute of limitations applicable to §1981. As a result we are forced to create procedural limitations on such actions as a matter of judicial implication. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, [427 F. 2d 476, 488, (7th Cir.), *cert. denied* 400 U.S. 911 (1970)]; cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239-240 (1969). In this posture it is our duty to ensure that the procedural limitations we impose are consistent with §1981's underlying "humane and remedial" policy. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 427-429 (1965). See *Mizell* v. *North Broward Hospital District*, 5th Cir., 427 F.2d 468, 473-474 (1970). And we believe that underlying policy of justice and interracial accommodation imbedded in §1981 is not furthered by enmeshing actions under the statute in technicalities that operate to the disadvantage of plaintiffs who have acted entirely in good faith by taking their claims initially to EEOC."

478 F.2d at 994-95 n. 30.

Other Courts, in reaching the same result, have focused on the desirability of avoiding duplication of litigation. *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala. 1972); *Reynolds* v. *Daily Press, Inc.*, 5 CCH EPD ¶991 at 6649-50 (E.D. Va., 1972).[20]

[20] See also, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 255 n. 130 (5th Cir. 1974); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex., 1972).

The Sixth Circuit's position conflicts in principle with its decision in *Schiff* v. *Mead Corp.*, 3 CCH EPD ¶8043 (1970) and with those decisions in the Fifth and Ninth Circuits and various district courts holding that the period of limitation for the commencement of proceedings under Title VII should be tolled for the period during which resolution through arbitration or through the National Labor Relations Board is attempted.[21]

Just as, in those cases, the tolling rule was invoked to encourage private settlement without litigation, see, e.g., *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970), the rule should be applied to the instant case to encourage conciliation by the EEOC before resort to litigation.

[21] *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Wells* v. *Gainesville-Hall County Economic Opportunity Organization Inc.*, 5 CCH EPD ¶8541 (N.D. Ga., 1973; *Guerra* v. *Manchester Terminal Corp., supra.*

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals affirming the District Court's dismissal of petitioner's claim under 42 U.S.C. §1981 should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103
Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel